

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the amendment)	NOTICE OF AMENDMENT
of ARM 38.2.5001, 38.2.5002,)	AND REPEAL
38.2.5004, 38.2.5007,)	
38.2.5008, 38.2.5014, 38.2.5015,)	
38.2.5017, 38.2.5021, 38.2.5022,)	
38.2.5023, 38.2.5024, 38.2.5028,)	
38.2.5030, and the repeal of)	
ARM 38.2.5016, 38.2.5020, 38.2.5027)	
pertaining to Protective Orders and)	
Protection of Confidential Information)	

TO: All Concerned Persons

1. On June 21, 2007, the Department of Public Service Regulation, Public Service Commission (commission) published MAR Notice No. 38-2-197 regarding the public hearing on the proposed amendment and repeal of the above-stated rules at page 833 of the 2007 Montana Administrative Register, Issue No. 12.

2. The commission has amended ARM 38.2.5001, 38.2.5002, 38.2.5008, 38.2.5014, 38.2.5015, 38.2.5017, 38.2.5021, 38.2.5023, 38.2.5028, and repealed 38.2.5016, 38.2.5020 and 38.2.5027 exactly as proposed.

3. The commission has not adopted the proposed amendments to ARM 38.2.5004 and 38.2.5030.

4. The commission has amended ARM 38.2.5007(1) through (5) and (8) exactly as proposed. The commission has amended ARM 38.2.5007((6) and (7), 38.2.5022 and 38.2.5024 with the following changes (stricken matter interlined, new matter underlined):

38.2.5007 PROTECTIVE ORDER--REQUESTS, TIMING OF REQUESTS, AND PROCEDURE (1) through (5) remain as proposed.

(6) Prior to issuing a protective order the commission will After reviewing the demonstrations made pursuant to (3), (4), and (5), and may if necessary, questioning a provider on those demonstrations, ~~the commission for cause will either decline to issue a protective order, or will issue a provisional protective order to the provider.~~

(7) A request for protective order must not include the claimed confidential information. Generally, claimed confidential information must not be filed at the commission before the issuance of a requested protective order. If it is necessary for the commission to access claimed confidential information prior to the issuance of a protective order, such access will be by special commission order. Following receipt of a provisional protective order the provider must immediately file the

~~claimed confidential information with the commission. The commission will review the information in camera, and for cause will either decline to issue a protective order for all or part of the information, or will issue a protective order for all or part of the information. If the commission declines to issue a protective order for all or part of the information, the claimed confidential information for which a protective order was not issued will be returned to the provider. A provisional protective order will remain in force for the duration of the commission proceeding in which it is issued, for the purpose of commission review of all claimed confidential information, that is within the scope of the provisional protective order, submitted periodically during the course of the proceeding.~~

(8) and (9) remain as proposed.

38.2.5022 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS
--ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION--

~~COMMISSION AND CONSUMER COUNSEL~~ (1) Except as otherwise provided by the commission in a protective order, commissioners, and commission staff, and ~~requesting parties~~ may have access to all confidential information made available pursuant to protective order, and shall be bound by the terms of the protective order.

(2) remains as proposed.

38.2.5024 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS
--ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION--EMPLOYEE
EXPERTS OF PARTIES (1) through (c) remains as proposed.

(d) If the requesting party receives an objection within the time required, the requesting party and provider must attempt to resolve the objection. If the parties are unable to resolve the objection, either the requesting party may apply to the commission, not later than ten business days from service of the objection on the requesting party, for a ruling. If neither party applies for a ruling, the provider's objection is deemed granted and the designated employee expert may not be given access to the information. Access to the information shall not be given to the designated employee expert pending ruling by the commission.

(e) through (f)(2) remain as proposed.

(3) ~~All written communication between or among parties that occurs pursuant to this rule must be served on the commission.~~ All written communication referred to in this rule must be served on the commission.

(4) ~~Written communication as used in this rule does not include electronic communication.~~ Service of written communication means physical delivery or deposit in the mail.

5. Qwest Corporation, Montana-Dakota Utilities Company, Mountain Water Company and NorthWestern Energy submitted joint written comments. The following is a summary of the comments on proposed rules which the commission has adopted, and commission responses.

Comments on ARM 38.2.5007: Joint commenters contend the amendment to ARM 38.2.5007(3)(b) is unnecessary and unreasonable because it fails to recognize the difference "between confidential information produced in response to a data

request, and confidential information submitted to the commission for its deliberations." They indicate they have no objection to providing a nonconfidential summary of confidential information introduced into evidence by a party to a proceeding, but do object to providing such a summary when the confidential information is provided in response to a data request. They also surmise that if "onerous" requirements to give nonconfidential summaries of confidential information provided in data responses are imposed, parties will resist providing information on discovery that they otherwise would provide without objection. Thus, this rule as proposed may embroil the commission in discovery disputes that may otherwise be avoided.

Responses: For the purposes of the amendment to ARM 38.2.5007(3)(b) there is no relevant distinction between confidential information provided in response to a data request (and which, presumably, never becomes part of the evidentiary record), and information filed on provider initiative, which becomes part of the evidentiary record and subject to commission deliberations. The amendment to this subsection is linked to the repeal of ARM 38.2.5016. The commission's rationale is that the requirement to provide nonconfidential summaries at ARM 38.2.5016 has not always been complied with nor enforced; and, given that nonconfidential summaries have to be provided when a provider requests a protective order, the commission reasoned that it makes sense to combine the requirement at ARM 38.2.5016 with the requirement at ARM 38.2.5007(3)(b). ARM 38.2.5007(3)(b) as amended, will serve two purposes, it will continue to require the necessary nonconfidential information in the pleadings to support a request for protective order, and it will simultaneously serve the purpose of providing a nonconfidential description of protected information that will be available to the public. This last was the intended purpose of ARM 38.2.5016 when it was adopted in 2004. Adopting the amended language at ARM 38.2.5007(3)(b), and repealing ARM 38.2.5016, should be less burdensome to providers, while continuing to meet the purpose of the commission when it adopted ARM 38.2.5016. The comments on the amendments to ARM 38.2.5007 contain objections to the proposed amendments to ARM 38.2.5007(6) and (7). The commission does not adopt the proposed amendments to these subsections at this time.

Comments on ARM 38.2.5008: Joint commenters contend that ARM 38.2.5008(5) is unreasonable because it "would require jurisdictional utilities to permanently monitor closed dockets long after the issues in the docket, or the information provided in the docket was of interest to the public."

Responses: Joint commenters misread the proposed rule. The proposed rule requires notification to the commission when providers become aware that there is no longer a basis for protection. (For example, in the most obvious case, on becoming aware that the information is public.) "On becoming aware" is not the same as "permanently monitor." This proposed rule reflects an obligation on the part of the commission that it not protect information that is not entitled to protection, and it imposes very little burden on providers of confidential information.

Comments on ARM 38.2.5015: Joint commenters oppose ARM 38.2.5015(2) because, "it is too easy to disseminate [protected] information [in electronic format] in violation of the protective order under which it is being provided." They continue that it is too easy to disseminate protected information in electronic format by mistake or accident.

Responses: This proposed subsection allows providers to request for good cause the provision of protected information through a medium other than yellow paper. It does not require the provision through another medium. Providers who are concerned about the accidental dissemination of information provided by electronic means may provide the information on yellow paper.

Comments on ARM 38.2.5017 and 5023: The proposed amendments to these rules are linked, and the joint commenters address them together. Joint commenters oppose amending the protective order rules to allow any entity, other than the provider, to give the information to others. They write: "All access to protected information must be provided by the party whose confidential information is protected. That is a necessary and critical component of the property rights attendant to a trade secret, as the party whose property rights are at stake has the right to protect its property interests in accordance with the commission issued protective order."

Responses: The amendment authorizes legal counsel who have a right to the information to pass the information to other legal counsel who also have a right to the information. This avoids a cumbersome and sometimes time consuming process of involving the provider in the transfer of the information - usually in the context of a tight procedural schedule - and it does not compromise the rights of providers to protect property interests "in accordance with the commission issued protective order." This amendment does not affect the rights of providers under commission protective order rules.

Comments on ARM 38.2.5021: Joint commenters support this proposed rule amendment except for the reference to 38.2.5007(3)(b). Joint commenters oppose the proposed amendments at 38.2.5007(3)(b).

Responses: The commission has responded to the joint commenters objections to 38.2.5007(3)(b), and has decided to adopt that subsection as proposed. The reference to 38.2.5007(3)(b), therefore, remains in this rule.

Comments on ARM 38.2.5022: Joint commenters object to the term "requesting parties" that was added to subsection (1) of this proposed rule. They say it can be taken out of context and interpreted as meaning "not only legal counsel for the requesting party, but the requesting party."

Responses: The commission cannot prevent an erroneous interpretation. "Requesting party" is specifically defined as a person - ARM 38.2.5001(5) - and it is specific persons who may gain access to confidential information, not entities who

are parties to a proceeding. (It is possible, of course, for a person and a party to be the same.) Regardless, "requesting parties" is not necessary in subsection (1) and will be deleted. The requirement that a provider must provide confidential information to a requesting party is contained at ARM 38.2.5017. Reference to "consumer counsel" in the title of the rule is also not necessary and will be deleted.

Comments on ARM 38.2.5024: Joint commenters object to the deletion of the last sentence at ARM 38.2.5024(1)(d). They comment, "It makes no sense to give the proposed employee expert access to a trade secret when access is being challenged." They also comment that ARM 38.2.5024(3) and (4) are "unduly broad," and should be limited to objections and statements of no objection as discussed in the rule. They write, "Parties have a right to communicate with each other without filing their communications with the Commission"

Responses: The last sentence of ARM 38.2.5024(1)(d) is correctly deleted as redundant. Under the rule an employee expert may not gain access to protected information unless legal counsel first proposes access (ARM 38.2.5024(1)), and, second, receives a statement of no objection (ARM 38.2.5024(1)(c)). Removing the last sentence of ARM 38.2.5024(1)(d) will not result in a proposed employee expert gaining access during the challenge process. However, to avoid any misunderstanding and to give extra assurance to providers, the commission will retain this sentence. With respect to ARM 38.2.5024(3) and (4), the commission agrees that the proposed rule should be changed, and has done so as indicated at paragraph 3, above. Also, at the second sentence of ARM 38.2.5024(1)(d), the commission has struck the word "either" and substituted "the requesting party." The commission cannot conceive of a situation where the provider would apply for a ruling in this context.

/s/ Greg Jergeson
Greg Jergeson, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed by Robin A. McHugh

Certified to the Secretary of State December 10, 2007.